Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

INOCO PLC,

Petitioner,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED

Whether it was just and practicable for the United States Court of Appeals for the Ninth Circuit to retroactively apply amended Bankruptcy Rule 7004(f) to the underlying adversary proceeding to find personal jurisdiction over the Petitioner, a foreign corporation which would not otherwise be subject to personal jurisdiction, when the amendments took effect after the applicable statutes of limitations for the underlying claims for relief had run, nearly two years after the Petitioner's motion to dismiss, nearly three years after the commencement of the adversary proceeding and over five years after the purported jurisdictional events took place?

PARTIES TO THE PROCEEDING

Petitioner is Inoco Plc, a United Kingdom corporation now known as Inoco Limited, which was a defendant-appellant in the Court of Appeals. Inoco Limited's parent company is Lawgra, Plc; it has no nonwholly owned subsidiaries.

Respondents are Bernard Goodson, Ford Elsaessar, Lowell Finley and Jay J. Miller who were plaintiffs-appellees in the Court of Appeals. Respondents are the trustees of a litigation trust formed for the purpose of prosecuting the claims asserted in an amended complaint filed in the United States Bankruptcy Court for the District of Idaho on November 30, 1994, on behalf and for the benefit of substantially all of the unsecured creditors of Gulf USA Corporation and its wholly owned subsidiary, Pintlar Corporation, the reorganized debtors.

David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran were also defendants-appellants to the Ninth Circuit appeal.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Factual Background	4
C. The Underlying Litigation	6
D. The Amended Complaint	6
E. The Jurisdictional Motions	9
F. The Bankruptcy Court's Decision	10
G. The Appeals To The District Court	11
H. The Appeal To The Ninth Circuit	14
REASONS FOR GRANTING THIS PETITION	15

PAGE

I. The Ninth Circuit Erred By Retroactively Applying The Recent Amendments To The Bankruptcy Rules To The Underlying Adversary Proceeding 16

CONCLUSION 21

TABLE OF AUTHORITIES

Cases PAGE

Arrowhead Estates Dev. Co. v. United States Trustee (In re Arrowhead Estates Dev. Co.), 42 F.3d 1306 (9th Cir. 1994) 20, 21

Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974) 18

Chenault v. United States Postal Service, 37 F.3d 535 (9th Cir. 1994) 16, 18, 20

Gemini Enterprises, Inc. v. WFMY Television Corp., 470 F. Supp. 559 (M.D.N.C. 1979) 10

Goodson v. Rowland, 133 F.3d 1141 (9th Cir. 1998) ..... *passim*

Hoag v. Sweetwater Int'l, 857 F. Supp. 1420 (D. Nev. 1994) 17

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 15, 16, 18, 19, 20

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 20

Sher v. Johnson, 911 F.2d 1357 (9th Cir. 1990) 10, 13

Textor v. Board of Regents of N. Ill. Univ., 711 F.2d 1387 (7th Cir. 1983) 10

Underwager v. Channel 9 Australia, 69 F.3d 361 (9th Cir. 1995) 13, 14

Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977) 13

PAGE

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 17

Statutes and Rules

11 U.S.C. § 546(a) 8

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 14

Fed. R. Bankr. P. 7004(e) 9

Fed. R. Bankr. P. 7004(f) 3

Delaware General Corporation Law § 160 9

I.C. § 5-216 9

I.C. § 5-217 8

I.C. § 5-218(4) 8, 9

I.C. § 5-224 8

Miscellaneous

1996 U.S. Order 96-14 (Order of the Supreme Court of the United States Adopting and Amending Rules, Apr. 23, 1996) 16, 19, 20

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Inoco Plc ("Inoco" or "Petitioner") respectfully requests that this Court issue a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Ninth Circuit filed November 3, 1997 and amended January 14, 1998 in this matter.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 133 F.3d 1141 (9th Cir. 1998), and is reproduced in the Appendix[1] at A 1a-14a. The opinion of the United States District Court for the District of Idaho is not reported, and is reproduced at A 34a-57a. The opinion of the United States Bankruptcy Court for the District of Idaho is not reported, and is reproduced at A 79a-168a.

STATEMENT OF JURISDICTION

The opinion and order of the Court of Appeals was filed on November 3, 1997 and, after rehearing, amended on January 14, 1998 (A 1a-14a). The jurisdiction of this Court to review the opinion and order of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Court of Appeals' erroneous retroactive application of amended Bankruptcy Rule 7004 to the underlying adversary proceeding. The former Bankruptcy Rule 7004, in effect through November 30, 1996, is set forth at A 169a-173a. The revised Bankruptcy Rule 7004 is set forth at A 174a-178a.

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[1] Since the appeals of Petitioner and of David J. Rowland ("Rowland"), Jeremy E. James ("James"), David L. Hudd ("Hudd") and Derek J. Moran ("Moran," and collectively with Rowland, James and Hudd, the "Rowland Directors") were consolidated in the courts below and the Rowland Directors are also Petitioning this Court for Writ of Certiorari, Petitioner Inoco will rely on the Appendix submitted by the Rowland Directors. References preceded by "A" herein refer to pages in the Appendix accompanying the Petition submitted by the Rowland Directors.

STATEMENT OF THE CASE

A. Introduction

Petitioner is a foreign corporation with no contact with the State of Idaho (A 123a). Nevertheless, it has been sued in the United States Bankruptcy Court for the District of Idaho in connection with alleged wrongs which, again, were not committed in Idaho. Ever since the commencement of the adversary proceeding against it and others in 1994, Petitioner has been contesting jurisdiction. No doubt recognizing that both the Bankruptcy Court and the District Court erred in finding that sufficient facts had been stated by Respondents to withstand a motion to dismiss for lack of personal jurisdiction based on the misapplication of the "conspiracy" theory of jurisdiction to this case, the United States Court of Appeals for the Ninth Circuit did not address this basis for the lower courts' findings. Instead, the Ninth Circuit retroactively applied a new amendment to Bankruptcy Rule 7004, which confers jurisdiction over non-resident defendants so long as the exercise of jurisdiction is consistent with the Constitution. Rule 7004(f) provides:

> (f) *Personal Jurisdiction.* If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code, or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

Fed. R. Bankr. P. 7004(f) (A 177a-178a). Accordingly, the Ninth Circuit held that, if properly served, personal jurisdiction can be asserted over such defendants by any bankruptcy court, so long as they had contacts with the United States. Thus, the Ninth Circuit has effectively created jurisdiction over

Petitioner where none previously existed, long after the predicate acts conferring jurisdiction occurred, and long after the applicable statutes of limitations for the various claims for relief alleged against Petitioner have expired, thereby significantly impacting upon its rights, liabilities and remedies.

Under the circumstances, the Ninth Circuit should be reversed and the amended complaint dismissed against Petitioner. At the very least, the matter ought to be remanded for a hearing to determine whether the retroactive application of amended Bankruptcy Rule 7004 was just or practicable in this case.

B. Factual Background

At all relevant times, Petitioner was a publicly traded United Kingdom corporation headquartered in England (A 86a). It never has had an office outside England. It is undisputed that not only has Petitioner never had any office in Idaho, but it never employed anyone in Idaho, never owned property in Idaho, never had any bank or brokerage accounts in Idaho, never negotiated or executed any contract in Idaho, never consented to jurisdiction in Idaho, and never appointed any agent for service of process in Idaho.

In 1989, an Inoco subsidiary, Downshire N.V. ("Downshire"), acquired a large interest in the stock of Gulf USA Corporation ("Gulf"), a Delaware corporation that was headquartered in Boston, Massachusetts (A 86a). At the same time, the Rowland Directors, each of whom was an officer and/or director of Petitioner, joined Gulf's Board of Directors and/or became an officer of Gulf. In addition, Gulf, Petitioner and the Rowland Directors entered into a "Standstill Agreement" pursuant to which any transactions between Gulf and Petitioner, the Rowland Directors or their affiliates required the approval of two-thirds of Gulf's directors, in consequence of which, Gulf's independent directors had the ability to veto

any such transaction (A 84a-87a). Petitioner itself subsequently acquired some additional Gulf stock.

In July 1991, Petitioner and Downshire sold all of their Gulf stock to Nycal Corporation ("Nycal"), an unrelated publicly held Delaware corporation (A 99a). Immediately thereafter, disputes arose between Nycal and Petitioner with respect to Gulf, and Petitioner commenced a lawsuit in England. In October 1991, these disputes were settled. As part of the settlement, Nycal, Gulf and a Gulf subsidiary executed and delivered general releases to Petitioner (A 100a).

During 1989-91, while Petitioner and Downshire held Gulf stock, Gulf was headquartered in Massachusetts (A 85a), conducted *no* commercial activity in Idaho and was not even qualified to do business in Idaho. The business of Gulf and its subsidiaries consisted primarily of oil and gas operations in Texas and Louisiana, coal operations in Pennsylvania and real estate operations in New Zealand. A former Gulf subsidiary, Bunker Hill Company ("Bunker Hill"), previously had conducted mining and smelting activities in Idaho, but the Bunker Hill mine had closed in 1981 and been sold to an unaffiliated purchaser in 1982. Gulf remained responsible, however, for some obligations that had been incurred by Bunker Hill prior to its sale and was named by the Environmental Protection Agency as a potentially responsible party for environmental damage that had occurred at the Bunker Hill mining site (A 85a -86a).

Ten years after the sale of Bunker Hill, *i.e.*, in 1992, which was *after* Petitioner and Downshire had sold their Gulf stock to Nycal, and *after* Gulf had delivered a general release to Petitioner, a Gulf subsidiary, Pintlar Corporation ("Pintlar"), reacquired the Bunker Hill mining site in connection with the bankruptcy of the site's owner (A 85a-86a). In October 1993, creditors filed involuntary bankruptcy petitions against Pintlar and Gulf in the Bankruptcy Court in Idaho (A 39a).

Gulf initially contested the Idaho venue and filed a voluntary petition in Delaware, but subsequently consented to the issuance of bankruptcy relief in Idaho.

C. The Underlying Litigation

On January 27, 1994, Gulf, as debtor-in-possession, commenced the underlying litigation as an adversary proceeding in the Bankruptcy Court in Idaho. An amended complaint was filed in November 1994 and added two plaintiffs: (1) Gulf's subsidiary, Pintlar, as debtor-in-possession; and (2) Pintlar's President, H.P. Harbert, as trustee of a litigation trust to which Gulf and Pintlar had assigned claims (A 84a). After confirmation of the Gulf and Pintlar plan of reorganization, Gulf, Pintlar and Harbert were replaced as plaintiffs by four individual trustees who succeeded Harbert as trustee of the litigation trust.[2] The amended complaint names 32 individuals and corporations as defendants. The named defendants include, in addition to Petitioner, the Rowland Directors, Nycal, several individuals who were affiliated with Nycal, and Gulf's own independent directors. Downshire is not named as a defendant.

D. The Amended Complaint

The amended complaint contains nine counts, eight of which name Petitioner as one of the defendants. It alleges that the Rowland Directors, while serving as officers and directors of Gulf, engaged in a scheme to "loot" Gulf, and that Gulf thereafter continued to be looted by the Nycal appointees who succeeded the Rowland Directors on Gulf's board. The key allegation against Petitioner is that the Rowland Directors

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[2] On January 25, 1996, Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller, as trustees of the litigation trust, replaced Gulf, Pintlar and Harbert as plaintiffs. Goodson, Elsaesser, Finley and Miller will hereinafter be referred to as Respondents (A 62a-65a).

used Petitioner as a vehicle to gain control of Gulf during 1989 and then used that control to "loot" Gulf. Except for allegations (described below) that Petitioner received fraudulent conveyances in four of the many transactions by which Gulf allegedly was looted, there are no allegations of any acts by Petitioner that constituted participation in the alleged scheme to loot Gulf, or of facts that would indicate that Petitioner itself was anything other than a passive shareholder, directly and through Downshire, of Gulf.

With respect to the amended complaint's assertions that Petitioner received fraudulent conveyances from Gulf, the alleged fraudulent conveyances relate to four specific matters. None of these matters had anything to do with Idaho, or with the Idaho acts by other defendants (*i.e.*, Rowland, James and Hudd) on which the exercise of long-arm jurisdiction over Petitioner in Idaho was premised. Pursuant to the Standstill Agreement, all of these transactions were approved by Gulf's independent directors.[3]

The amended complaint also contains three claims in which Petitioner is not alleged to have participated. None of these transactions occurred in Idaho or involved the alleged acts by other defendants on which jurisdiction over Petitioner in Idaho is premised. This amended complaint thus contains: (1) a claim that six transactions, four of which are not even alleged to have included Petitioner as a participant, and none of which had anything to do with Idaho, constituted breaches of the Standstill Agreement, which required approval by Gulf's independent directors of transactions between Gulf and

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[3] These four transactions are (1) Gulf's alleged rental from Petitioner of office space in *New York* and *London* (A 89a); (2) Gulf's alleged payment of compensation to individuals employed by Petitioner in *England* (A 89a); (3) Gulf's alleged purchase from Petitioner of stock in a corporation that held a contract to acquire real estate in *Texas* (A 94a-95a); and (4) the settlement among Nycal, Gulf and Petitioner that was entered into in *England* in October 1991, after Petitioner had divested itself of its interest in Gulf (A 100a).

persons related to the Rowland Directors or Petitioner;[4] (2) a claim for an alleged violation of Delaware General Corporation Law § 160, which supposedly prohibited certain stock repurchases by Gulf in which Petitioner is not alleged to have participated; and (3) a claim that seeks to toll statutes of limitation against defendants, including Petitioner, by reason of misrepresentations allegedly made by defendants other than Petitioner.

Finally, the amended complaint includes a conclusory claim that Petitioner participated in a "civil conspiracy" with the Rowland Directors and other defendants to "accomplish unlawful purposes" involving each of the many transactions in which *Gulf* is alleged to have engaged while Petitioner and Downshire owned Gulf stock. Petitioner is not alleged to have had any involvement in most of these transactions, and none of them is alleged to have occurred in Idaho or to have involved the alleged Idaho acts by the Rowland Directors on which jurisdiction over Petitioner in Idaho is premised. In all events, as the longest applicable statute of limitations for any of the claims for relief is five years, it is clear that by December 1, 1996, the date that the amended bankruptcy rules took effect, each of the claims for relief would have been barred by the relevant statute of limitations.[5]

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[4] The two transactions in which Petitioner is alleged to have participated are (1) the *New York* and *London* office rentals, and (2) the alleged payment by Gulf of compensation to employees of Petitioner in *England* (A 89a).

[5] Count I is governed by 11 U.S.C. § 546(a) (earlier of (1) the later of (a) two years after order for relief or (b) one year after appointment of the first trustee and (2) the time the case is closed or dismissed). Count II, for breach of fiduciary duties, corporate waste and mismanagement is governed by I.C. § 5-217 and I.C. § 5-224 and has a statute of limitations of four years. Count III, for misrepresentation is governed by I.C. § 5-218(4) and has a statute of limitations of three years. There is no statute, nor any case law, creating a separate cause of action, let alone a statute of limitations for Counts IV and V, seeking damages for aiding and abetting and civil conspiracy. Count VI, breach of the Standstill

E. The Jurisdictional Motions

Petitioner, the Rowland Directors and several other defendants moved to dismiss this litigation for lack of personal jurisdiction (and, in the case of some defendants, insufficient service of process). The parties submitted affidavits and declarations; no evidentiary hearing was held.

The basis of Petitioner's jurisdictional motion was that it had had no contacts whatsoever with the forum state of Idaho, whose long-arm statute was controlling pursuant to Fed. R. Bankr. P. 7004(e). It was undisputed on the motion that Petitioner was at all relevant times a publicly-traded corporation organized under the laws of the United Kingdom, headquartered in England, with no offices outside England; that Petitioner never had any offices in Idaho, never employed anyone in Idaho, never owned any property in Idaho, never had any bank or brokerage accounts in Idaho, and never transacted any business in Idaho; that Petitioner never negotiated or executed any contracts in Idaho; and that Petitioner never consented to jurisdiction in Idaho or appointed any agents in Idaho to accept service of process.

The Respondents' submissions attempted to link numerous individuals, including but not limited to the Rowland Directors, to an alleged "conspiracy" to "loot" Gulf, but Respondents' extensive papers contained no evidence of any Idaho contacts by Petitioner or any evidence that Petitioner participated in a conspiracy beyond the bare-bones fact that the Rowland Directors were officers or directors of Petitioner at the same time that they were officers or directors of Gulf. Petitioner responded with a declaration by its Chief Executive

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Agreement, is governed by I.C. § 5-216 and has a statute of limitations of five years. Count VII, seeking damages for violation of Delaware General Corporation Law Section 160 has a statute of limitations of three years. Count VIII seeks to toll all statute of limitations due to fraud which is governed by a statute of limitations of three years. Count IX seeks to avoid the releases on account of fraud and is likely governed by I.C. §5-218(4) and has a statute of limitations of three years.

Officer, Graham J. Robeson. Robeson categorically denied that Petitioner had been part of any conspiracy, and further denied that the Rowland Directors' alleged acts had been taken by them as Petitioner's agents.

F. The Bankruptcy Court's Decision

In a memorandum of decision entered on September 29, 1995 (A 79a-168a) and order entered November 1, 1995 (A 69a-72a), the Bankruptcy Court dismissed the claims against eleven moving defendants on jurisdictional grounds, granted a motion to quash the service upon an additional defendant, and for the most part denied the motions to dismiss by Petitioner and the Rowland Directors.

The Bankruptcy Court premised its denial of the motion to dismiss *solely* on the basis of a "conspiracy" theory of jurisdiction. The court acknowledged that the "circuits are split" (A 121a) as to the propriety of such a theory, and that "courts in the Ninth Circuit which have addressed the issue of imputed jurisdiction have rejected the conspiracy doctrine" (A 147a n.13). The Bankruptcy Court nevertheless adopted the theory, relying principally on *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1392-93 (7th Cir. 1983), which characterized the theory as "based on the 'time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.' " 711 F.2d at 1392 (quoting from *Gemini Enterprises, Inc. v. WFMY Television Corp.*, 470 F. Supp. 559, 564 (M.D.N.C. 1979)) (A 122a). Ignoring the fact that the Ninth Circuit specifically warned in *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990), that "[l]iability and jurisdiction are independent," so that "[r]egardless of their joint liability, jurisdiction over each defendant must be established individually," the Bankruptcy Court elected to follow *Textor* and adopt that decision's "conspiracy" theory.

The Bankruptcy Court, for purposes of the motion, treated Respondents' allegations as if they were true (A 103a). Thus, the Bankruptcy Court imputed the alleged forum-related acts of Hudd and Rowland to Petitioner, and found that Respondents had pleaded sufficient facts, which if proven, would subject Petitioner to personal jurisdiction for those claims that supposedly arose from the alleged conspiracy (A 123a-124a). The court then went on, erroneously, to analyze the issue of whether the exercise of personal jurisdiction over Petitioner in Idaho was consistent with due process by examining Petitioner's contacts with the United States as a whole rather than just Petitioner's contacts with Idaho (which were non-existent) (A 144a-146a).

The Bankruptcy Court did grant the motions by Petitioner and the Rowland Directors to the extent of dismissing that portion of one claim that alleged "corporate waste" and "mismanagement." It concluded that those claims could not be brought in Idaho on the basis of "conspiracy" jurisdiction because they sound in negligence rather than intentional tort and therefore cannot have been part of a "conspiracy" (A 120a-121a).

G. The Appeals To The District Court

Petitioner and the Rowland Directors moved for leave to appeal to the District Court, which was granted (A 66a-68a). The District Court also consolidated the two appeals (A 58a-61a).

In a memorandum decision and order entered on August 16, 1996, the District Court affirmed the Bankruptcy Court's denial of Petitioner's and the Rowland Directors' motions with respect to all tort (and "tort-like") claims. It reversed the Bankruptcy Court, however, to the extent of (1) dismissing one of Respondents' claims (*i.e.*, Count VI, the claim for breach of the Standstill Agreement), and (2) reinstating the "corporate waste" and "mismanagement" components of

Respondents' claim for breach of fiduciary duty (*i.e.*, Count II) (A 34a-57a).

The District Court premised its finding that Respondents had stated sufficient facts which, if proven would subject Rowland, James and Hudd to the court's jurisdiction on their alleged direct contacts with Idaho, which consisted of: (1) in Rowland's case, his signature, as an officer of *Gulf*, on a single letter on *Gulf* letterhead, which was sent by *Gulf* to former employees of the Bunker Hill mine and their families and assured them that *Gulf* would meet its obligations to creditors (A 38a, 49a-50a); (2) in the case of Hudd, his attendance at meetings in Idaho, exclusively with *Gulf* personnel, allegedly to prepare for negotiations with *Gulf's* environmental creditors, and his participation in telephone calls with *Gulf* personnel in Idaho, allegedly to discuss *Gulf's* environmental problems, and his request for and receipt of newspaper articles about *Gulf's* responses to environmental obligations (A 38a, 50a); and (3) in the case of James, his attendance at a single meeting in Idaho, exclusively with *Gulf* personnel, allegedly to prepare for negotiations with *Gulf's* environmental creditors (A 38a, 51a).[6]

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[6] Neither Rowland, Hudd nor James is alleged ever to have met or spoken to any creditor of Gulf. The Bankruptcy Court also relied on an affidavit in which Harbert, Pintlar's former President, alleged that Hudd and James had directed him to implement strategies that, in retrospect (but not at the time), he believed had the purpose of delaying action by Gulf's creditors, and that Hudd had attended a meeting with the Governor of Idaho (A 118a). As the District Court acknowledged, after the Bankruptcy Court had issued its decision, Harbert submitted a supplemental affidavit in which he retracted his prior assertion that Hudd had met with the Governor of Idaho, and corrected several other details in his prior statements about Hudd and James (A 38a-39a n.6). Remarkably, the District Court stated that these "admitted errors by Harbert are not grounds for discounting his remaining declarations" (A 39a n.6), which it continued to accept at face value notwithstanding Harbert's retraction of his most sensational charge.

In contrast to the basis for personal jurisdiction over Rowland, James and Hudd, the District Court premised personal jurisdiction over Petitioner (and co-defendant Moran) solely upon a "conspiracy" theory of jurisdiction (A 51a-52a). The District Court acknowledged that "[n]either Moran nor Inoco are alleged to have personally directed any action at Idaho that caused harm within the state," but it asserted that "each is alleged to have acted in concert with the other defendants in a joint effort to mislead Idaho creditors and loot Gulf's assets" (A 51a). The District Court went on to state that "[u]ntil recently the Ninth Circuit had not determined whether due process concerns would permit the forum contacts of one conspirator to be imputed to a co-conspirator," but that "cases" had "indicated that where positive law created an agency-type relationship, the jurisdictional contacts of the 'agent' could be attributable to the 'principal' " (A 52a, citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 419-20, 422-24 (9th Cir. 1977), and *Sher v. Johnson*, 911 F.2d 1357, 1362 (9th Cir. 1990)). Although the District Court referred to an "agency-type relationship" that was "created" by "positive law," the two Ninth Circuit decisions upon which the District Court relied—*i.e.*, *Wells Fargo* and *Sher*—were traditional agency cases in which the issue was whether an actual agency relationship existed under the particular facts of the case, not whether some fictional "agency-type relationship" was "created" by operation of some legal doctrine.

The District Court then affirmed the Bankruptcy Court's adoption of the "conspiracy" theory of jurisdiction on the basis of an erroneous interpretation of the Ninth Circuit's decision in *Underwager v. Channel 9 Australia*, 69 F.3d 361, 364-65 (9th Cir. 1995), which the District Court incorrectly interpreted as "express[ing]" the Ninth Circuit's "willingness to accept a conspiracy theory of jurisdiction" (A 52a). In fact, however, in *Underwager*, the Ninth Circuit merely observed that the plaintiff in that case, in attempting to assert jurisdiction over two out-of-state defendants, had "cite[d] two

district court opinions in which a conspiracy theory was applied." 69 F.3d at 364. Neither case was from the Ninth Circuit, and the Court of Appeals merely held that the two cases did not support the plaintiff's position. *Id.* at 364-65. Therefore, the propriety of a "conspiracy" theory of jurisdiction remains an open question in the Ninth Circuit.

The District Court did not further address the constitutionality of a "conspiracy" theory of jurisdiction other than simply to adopt the theory, in conclusory fashion, in reliance upon its misreading of *Underwager*.

H. The Appeal To The Ninth Circuit

On September 16, 1996, the District Court amended its order to certify it for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (A 31a-33a). Timely petitions by Petitioner and the Rowland Directors for permission to appeal to the Ninth Circuit followed. On October 11, 1996, the Ninth Circuit granted both petitions (A 27a-30a).

No doubt recognizing that personal jurisdiction over the Petitioner was simply not tenable under the law applied below, the Court of Appeals did not address the "conspiracy" theory of jurisdiction, the Idaho long-arm statute or due process issues that were addressed by the courts below. Instead, the Ninth Circuit found that the Petitioner was subject to jurisdiction in Idaho under Federal Rule of Civil Procedure 4 (k)(2), made applicable to the proceeding by recent amendments to Rule 7004 of the Federal Rules of Bankruptcy Procedure (A 1a-14a).

The Court of Appeals found that the December 1, 1996 amendments to Bankruptcy Rule 7004 were applicable to this proceeding. In making this finding, the Ninth Circuit held that amended Bankruptcy Rule 7004 could be applied retroactively without undue prejudice to the Petitioner, in part, because the Petitioner did not offer factual evidence that it would have behaved differently if it had expected amended

Bankruptcy Rule 7004(f) to apply (A 11a). This holding overlooks the fact that amended Bankruptcy Rule 7004 did not exist at the time factual evidence was submitted to the Bankruptcy Court, so the Petitioner never had the opportunity to submit any evidence relating to the applicability of the amended Rule or its effects on the Petitioner's conduct.

Until December 1, 1996, the date that the amendments to Bankruptcy Rule 7004 took effect, there was no basis for the courts to assert personal jurisdiction over Petitioner. And, as set forth above, the statutes of limitations applicable to the underlying causes of action had run by that date. Thus, the Ninth Circuit's retroactive application of the amendments to Bankruptcy Rule 7004 to the underlying adversary proceeding extends the statutes of limitations, a result that contravenes its own precedent and that of this Court.

REASONS FOR GRANTING THIS PETITION

This appears to be the first and only Court of Appeals decision to date to address the question of whether amended Bankruptcy Rule 7004 should be applied retroactively to a pending adversary proceeding and thus is properly before this Court for review. By mechanically applying *dictum* from this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994), the Ninth Circuit has brought to life claims for relief against the Petitioner that never should have been brought in Idaho in the first place and which would have long ago been dismissed had the lower courts properly applied the law as it existed at the time those decisions were made. Such a result is neither just nor practicable and should not be allowed to stand.

I. The Ninth Circuit Erred By Retroactively Applying The Recent Amendments To The Bankruptcy Rules To The Underlying Adversary Proceeding

In its order adopting the 1996 amendments to the Bankruptcy Rules, this Court stated that the amendments would apply to cases pending on December 1, 1996 only where it was "just and practicable" to do so. 1996 U.S. Order 96-14 (Order of the Supreme Court of the United States Adopting and Amending Rules, Apr. 23, 1996) (A 181a). To apply the new rule in these circumstances is neither just nor practicable. The purported jurisdictional events occurred more than five years earlier, this litigation was commenced nearly three years earlier, and this motion was brought nearly two years earlier than the effective date of the amended Rule. And, in all events, the statutes of limitations applicable to the underlying causes of action all had run by the time the amended Rule took effect. The application of the new Rule to this case would alter the rights of the Petitioner by providing a basis for jurisdiction that did not exist at the time of the events underlying this action, at the time the action was commenced, or at the time the motion to dismiss was made. It would also revive causes of action that would otherwise be barred by the applicable statutes of limitations.

In making this decision, the Ninth Circuit ignored its own precedent, which recognized that even where a statute is procedural in nature, it may be unjust to apply the statute retroactively. *Chenault v. United States Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994). In *Chenault*, the Ninth Circuit refused to apply a new limitations period to actions taken prior to the enactment of the new statute, as such application would revive a claim that otherwise could not have been brought. *Id.*[7] Application of the new Rule would subject

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[7] *Landgraf*, 511 U.S. at 291 (1994) (Scalia, J., concurring) ("Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered") (emphasis added).

Petitioner to a claim in Idaho to which it otherwise would not be subject. The new Rule would thus prejudice the rights of the Petitioner as well as increase its liability.

Whether a defendant reasonably anticipated being haled into court in a particular forum is at the heart of the jurisdictional inquiry here. At the time of the events in question, the Petitioner could not have anticipated being haled into court in Idaho.[8] Under the Rule in effect until December 1, 1996, the Petitioner's contacts with Idaho were insufficient to justify personal jurisdiction. This was implicitly recognized by the Ninth Circuit which refused even to address the application of the "conspiracy" theory of jurisdiction to Petitioner below. New Rule 7004(f) completely alters the jurisdictional test, allowing a defendant's aggregate national contacts to provide a basis for jurisdiction. The Bankruptcy Rule in place at the time of the activities underlying this action should therefore be applied. *Hoag v. Sweetwater Int'l*, 857 F. Supp. 1420, 1424 n.2 (D. Nev. 1994) ("personal jurisdiction should be assessed according to the long arm statute in effect at the time the claim arose. Because jurisdiction is limited to claims arising out of forum-related activities, due process requires that the defendant have fair notice that such activities may expose it to local jurisdiction").

In rendering its decision, the Ninth Circuit stated that "Defendants' argument that they could not reasonably have expected being haled into court in Idaho is unpersuasive since

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[8] Limits upon the assertion of personal jurisdiction which are based on defendants' reliance interest are well-established in our constitutional jurisprudence. And, in evaluating whether the exercise of long-arm jurisdiction comports with due process, this Court has emphasized the unfairness of requiring a party to litigate in an unanticipated forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (whether a defendant "should reasonably anticipate being haled into court" in the forum state is a crucial consideration, and due process "allows potential defendants . . . some minimum assurance as to where [their] conduct will and will not render them liable to suit").

they had at least to reckon with application of the Idaho long-arm statute to their dealings affecting Idaho creditors" (A 11a). But, as set forth in greater detail above, Petitioner's "conduct" could not lead to jurisdiction under the Idaho long-arm statute. The Petitioner had no contacts with Idaho whatsoever (A 123a), and the "conspiracy" theory, used to impute the alleged Idaho contacts of others to Petitioner, should not have been employed.

And, since amended Bankruptcy Rule 7004(f) was not even in existence at the time the motion to dismiss was submitted to the Bankruptcy Court, the Petitioner did not and could not submit any factual evidence to show how it would have behaved differently had it expected the amended Rule to apply. It was not possible for the Petitioner to have submitted evidence regarding the effects of amended Bankruptcy Rule 7004(f) because that Rule did not exist. At the very least, this case ought to be remanded to afford Petitioner the opportunity to present evidence of how its conduct would have been different if it had known that these amendments would apply. In all events, however, whether Petitioner would have changed its conduct if it had known the amendments would apply is not determinative. *Chenault*, 37 F.3d at 539 (focus on prejudice to defendant, not whether defendant would have altered its conduct).

The Ninth Circuit's reliance on this Court's decision in *Landgraf* is misplaced. There, this Court decided whether a non-jurisdictional remedial statute that created an additional remedy for sexual harassment claims should apply retroactively where there was *no indication* of whether the statute was intended to apply to cases that were pending when it became effective. *Landgraf*, 511 U.S. at 280.[9] In contrast, the

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[9] In *Landgraf*, this Court clarified that "prospectivity remains the appropriate default rule" and that *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), which states that a court should apply the law in effect at the time of the decision, "did not alter [this] well-settled presumption." *Landgraf*, 511 U.S. at 272, 277. The Court

enabling order in the present case provides that the revised rules apply to pending cases only where "just and practicable" (A 181a). The Court made clear that, in deciding retroactivity, the first consideration is the expressed intent, if any, of the legislature, because if there is an express prescription, "there is no need to resort to judicial default rules" for deciding retroactivity. *Landgraf*, 511 U.S. at 280. In *Landgraf*, there was no such prescription, so the court relied upon a "deeply rooted" presumption against retroactivity. *Id.* at 265.

In *dictum*, the Court also observed that, in the absence of express prescriptions, statutes affecting jurisdiction "regularly" have been applied retroactively (*id.* at 274), cautioning, however, that "the mere fact that a new rule is procedural does not mean that it applies to every pending case," that the Court favored "the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case," and that "concerns about retroactivity" apply "to procedural rules." *Id.* at 275 n.29. The Court gave examples of prior cases in which the potential retroactivity of jurisdictional changes had been considered. *Id.* at 274. All but one of those cases involved changes in a court's subject-matter jurisdiction. The sole exception involved a change in rules relating to the location of the *res* for purposes of *in rem* jurisdiction; in that case the Court declined to apply the change retroactively. None of the cases involved a change in rules governing *in personam* jurisdiction.

Moreover, in the present case, unlike in *Landgraf*, there *is* an express prescription regarding retroactivity in the Supreme Court order that amended Rule 7004. Consistent with the "common-sense" approach referred to in *Landgraf*, the Supreme Court order expressly provides that the amendment should apply retroactively only "insofar as just and practi-

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distinguished cases such as *Bradley* which consider statutes involving issues that are separable from the cause of action and that do not impose an additional or unforeseeable obligation upon the defendant.

cable" (A 181a). Retroactive application of amended Rule 7004 to this case would contravene this prescription, because it would not be "just" in "the posture of the particular case" (*Landgraf*, 511 U.S. at 275 n.29). Up until December 1, 1996, there was no legal basis for jurisdiction over the Petitioner and the statutes of limitations on the underlying causes of action had already run. It would not be "just" to use a jurisdictional amendment to extend these statutes of limitations. The applicable considerations are no different from the ones that led the Ninth Circuit to conclude that legislation extending a statute of limitation should not apply retroactively because the defendant "would be forced to defend an action that was previously time-barred." *Chenault*, 37 F.3d at 539.

McGee v. International Life Ins. Co., 355 U.S. 220 (1957), relied upon by the Ninth Circuit, is distinguishable because it did not require retroactive application of the statute. In that case, this Court examined whether applying an amended statute to a contract entered into prior to the amendment would unconstitutionally impair the contract. *McGee*, 355 U.S. at 224. The case was decided under the Contracts Clause of the Constitution, and the Court held that the statute "neither enlarged nor impaired respondent's substantive rights or obligations under the contract." *Id.* Unlike the present case, *McGee* was based on a contract with substantial connection to the forum. *Id.* at 223.

Another case relied upon by the Ninth Circuit, *Arrowhead Estates Dev. Co. v. United States Trustee (In re Arrowhead Estates Dev. Co.)*, 42 F.3d 1306 (9th Cir. 1994) is also distinguishable from the case at bar. The *Arrowhead* court considered the retroactive application of an amendment to Bankruptcy Rule 8002(a) that provided that a notice of appeal filed after the announcement of an order but prior to its entry would be valid.[10] *Arrowhead* addresses a technical amendment

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[10] Prior to *Arrowhead*, a notice to appeal filed before entry of an order had no effect. *Arrowhead*, 42 F.3d at 1309-10.

to the rules governing the manner in which an appeal can be taken. That rule merely eliminated a "trap" invalidating otherwise valid appeals based on a formalistic timing requirement. *Arrowhead*, 42 F.3d at 1310. In contrast, new Rule 7004(f) provides personal jurisdiction where jurisdiction was lacking prior to the enactment of the statute. Retroactive application of this rule thus implicates constitutional and fairness concerns about prejudice to a defendant's rights not present in *Arrowhead*.

The retroactive application of revised Rule 7004(f) to this matter by the Ninth Circuit prejudices the rights of the Petitioner and is neither just nor practicable. Accordingly, the Rule in force prior to December 1, 1996 that was applied by the lower courts should be applied here and the case should be dismissed.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Dated: April 14, 1998

Respectfully submitted,

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Supreme Court, U.S.
FILED
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Nos. 97-1683 and 97-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF QUESTION PRESENTED 1

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT 1

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI FOR RESPONDENTS BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY AND JAY J. MILLER, AS TRUSTEES 2

STATEMENT OF THE CASE 2

A. Overview 2

B. The Decisions Below 5

1. The Bankruptcy Court 5

2. The District Court 7

3. The Court of Appeals 8

REASONS FOR DENYING THE PETITIONS 10

A. The Decision Below Is Not Contrary To Supreme Court Precedent And Does Not Present A Conflict Among The Circuits Requiring This Court's Attention 10

B. The Question Presented To This Court By Petitioners Is Not Crucial To The Ultimate Disposition Of This Case, As There Exist Several Separate Non-Constitutional Grounds Upon Which The Same Result Can Be Reached 11

C. This Court Is Not In The Practice Of Reviewing Appellate Decisions Where The Alleged Defect Occurred With Respect To A Finding Of Fact 13

D. The Court Of Appeals Did Not Abuse Its Discretion In Determining That It Was "Just and Practicable" To Apply Revised Bankruptcy Rule 7004(f) To This Pending Case 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Arrowhead Estates Dev. Co. v. United States Trustee (In re Arrowhead Estates Dev. Co.), 42 F.3d 1306 (9th Cir. 1994) 15

Barr v. Matteo, 355 U.S. 171 (1957) 12

Branti v. Finkel, 445 U.S. 507 (1980) 13

Inoco Plc and Others v. Gulf USA Corp., 1995 I No. 781, Court of Appeal (Eng.), Jan. 22, 1997 12

Landgraf v. USA Film Prods., 511 U.S. 244 (1994) 9, 15

McCray v. New York, 461 U.S. 961 (1983) 11

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 9

Nycal Corp. v. Inoco, Plc., 96 Civ. 7159, 1997 WL 774683 (S.D.N.Y. Dec. 12, 1997) 5

Republic Nat'l Bank v. United States, 506 U.S. 80 (1992) 16

Rogers v. Lodge, 458 U.S. 613 (1982) 13

Ross v. Moffitt, 417 U.S. 600 (1974) 10

United States v. Johnston, 268 U.S. 220 (1925) 13

Other Authorities

10 Lawrence P. King, *Collier on Bankruptcy* (15th ed. rev. 1996) 14

Rules

Fed. R. Bankr. P. 7004(f) ..... passim

Fed. R. Civ. P. 4 ..... 4, 14

Fed. R. Civ. P. 4(k)(2) 14

COUNTER-STATEMENT OF QUESTION PRESENTED

Should *certiorari* be granted in order to determine whether the Court of Appeals *abused its discretion* in finding -- in the words of this Court's Order adopting revised Bankruptcy Rule 7004(f) -- that it was "just and practicable" to apply the revised rule to this action in order to determine whether personal jurisdiction existed over Petitioners, particularly where, as here:

- the Court of Appeals' decision is not contrary to Supreme Court precedent and does not present a conflict among the circuits;

- the question presented is not crucial to the ultimate disposition of the case, as there exist several other non-constitutional grounds upon which the decisions below can be affirmed; and

- Petitioners face no substantive consequences as the result of what Petitioners erroneously contend is a "retroactive" application of a rule that in any event supplies only an additional basis for upholding jurisdiction over them.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondents Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller are the trustees of a litigation trust established under the laws of, and resident in, the State of Idaho. (A 63a.) The litigation trust was formed for the purpose of prosecuting the claims asserted in an amended complaint filed in the United States Bankruptcy Court for the District of Idaho on November 30, 1994, on behalf and for the benefit of substantially all of the unsecured creditors of Gulf USA Corporation and its wholly owned subsidiary, Pintlar Corporation, reorganized debtors. (A 36a-37a, 39a.) None of the Respondents, nor the litigation trust, has any parent or subsidiary companies.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI FOR RESPONDENTS BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY AND JAY J. MILLER, AS TRUSTEES

Respondents Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller (the "Trustees") respectfully request that this Court deny the petitions for writs of *certiorari* filed by David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran (the "Rowland Directors") and Inoco Plc ("Inoco," and, together with the Rowland Directors, "Petitioners"), which seek review of the decision of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Pursuant to Rule 15.1 of the Rules of this Court, the Trustees provide the following statement of the case to correct the misstatements contained in the petitions filed by the Rowland Directors and Inoco.

A. Overview

In 1989, Petitioners -- foreign investors with a prior track record of engaging in speculative investments for the primary purpose of enriching themselves at the expense of others -- seized control of Gulf USA Corporation ("Gulf"),[1] formerly known as Gulf Resources and Chemical Corporation, an insolvent natural resources company that had, through liquidation of its principal business units, amassed $177 million in cash reserves.[2] (A 36a-37a.) These funds could (and should)

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[1] Gulf and its wholly owned subsidiary, Pintlar Corporation ("Pintlar"), together are referred to herein as "Gulf" or the "Company."

[2] Technically, a wholly owned subsidiary of Inoco named Downshire, N.V., purchased a 34 percent stake in Gulf. At the time of the purchase, Rowland held a controlling interest in Inoco through his family trust, and Rowland, along with Hudd, James and Moran, were officers of Inoco. (A 36a.)

continued on the following page...

have been used to satisfy substantial obligations relating to remedial and natural resource damages owed to the United States Environmental Protection Agency (the "EPA"), the Coeur d'Alene Indian Tribe and other environmental creditors,[3] pension and medical benefits to Pintlar's retirees, and bond-related and other debt owed to Gulf's creditors, located primarily in Idaho. (A 36a-37a, 86a.) Instead, as the amended complaint alleges, Petitioners systematically bled Gulf dry, removing assets from the United States (and away from creditors), committing millions of dollars to precarious or fraudulent stock trades, engaging in risk-laden real estate transactions halfway around the world, and lining their own pockets with the Company's money. (A 37a-39a, 87a-100a.) Over a 27-month span, Petitioners succeeded in reducing Gulf's cash reserves by more than $125 million before selling their interest in the Company and fleeing the United States. Id. Within two years, Gulf's bankruptcy ensued,[4] leading to the formation of the litigation trust and the commencement of this action, which seeks redress for the massive losses suffered by the Company's creditors. (A 39a.)

As the United States Bankruptcy Court for the District of Idaho correctly concluded (A 140a-146a) -- and as two appellate courts have acknowledged -- *there is no jurisdiction in the world better suited than the District of Idaho* to adjudicate the claims

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...continued from the preceding page

Upon the closing of the purchase, all four individuals also became officers and directors of Gulf as well. (A 37a.)

[3] In 1984, the EPA named Gulf as a potentially responsible party for the extensive environmental damage that had occurred at the Bunker Hill mining site (the "Bunker Hill Site") in Idaho -- one of *the* largest, if not the largest, SuperFund sites in the country -- during the period in which Pintlar owned and operated the site. (A 36a, 85a-86a.)

[4] In the Company's bankruptcy proceedings, its unsecured creditors submitted proofs of claims -- all of which were ultimately approved -- in excess of $1.6 *billion*.

asserted in this adversary proceeding. The victims of Petitioners' wrongdoing were principally located in Idaho; Petitioners' conduct was purposefully directed at Idaho; and Idaho suffered by far the greatest financial impact of Petitioners' fraudulent scheme. (A 54a-55a.)

Both the Bankruptcy Court and the District Court held that jurisdiction over Petitioners existed under Idaho's long-arm statute. The Court of Appeals recognized, however, that the exercise of jurisdiction here may be predicated on federal law without reference to the Idaho long-arm statute. This is because of revised Bankruptcy Rule 7004(f). On December 1, 1996, during the pendency of the instant action, Bankruptcy Rule 7004(f) was revised to make clear that bankruptcy courts may exercise jurisdiction over foreign defendants, such as Petitioners, provided that the exercise of jurisdiction comports with due process.[5] In such cases -- where federal law supplies the basis for personal jurisdiction and authorizes worldwide service of process -- due process is satisfied when defendants are shown to have sufficient aggregate contacts with the United States as a whole, not just with any particular state. In its Order adopting the revisions to the Bankruptcy Rules, this Court expressly stated that revised Bankruptcy Rule 7004(f) may be applied to pending cases such as the instant action "insofar as just and practicable." (A 181a.) Thus, where, as here, Petitioners have sufficient aggregate contacts with the United States, the exercise of

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[5] In relevant part, revised Bankruptcy Rule 7004(f) states:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons . . . in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

(A 177a-178a.)

jurisdiction under revised Bankruptcy Rule 7004(f) comports with due process.

B. The Decisions Below

On November 30, 1994, an amended complaint (the "Complaint") was filed in the Bankruptcy Court against certain of Gulf's former officers and directors and their affiliated corporate entities, including Petitioners.[6] As a basis of recovery against Petitioners, the Complaint asserted various legal theories arising out of Petitioners' scheme, including, without limitation, fraudulent conveyance, civil conspiracy, breach of fiduciary duty, corporate waste, mismanagement, misrepresentation and breach of contract.[7] (A 6a.)

1. The Bankruptcy Court

In early 1995, Petitioners moved to dismiss the Complaint for lack of personal jurisdiction and insufficiency of service. (A 83a.) On September 29, 1995, the Bankruptcy Court held that

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[6] Petitioners mislead this Court when they contend that the Ninth Circuit's decision revived claims that would otherwise be barred under the applicable statute of limitations. Rowland Directors' Petition (the "RD Petition") at 7; *see also* Inoco Petition at 15. The statute of limitations was tolled upon the timely filing of the original complaint on January 27, 1994 and continues to be tolled during the pendency of this action against Petitioners.

[7] In a misleading attempt to convince this Court that they have been absolved of all liability, Petitioners note that a different release they received from another entity at the same time they received a release from the Company has been upheld by a different judge in a different jurisdiction in an unrelated case in which neither Gulf nor the Trustees were parties. RD Petition at 8 n.5 (citing *Nycal Corp. v. Inoco, Plc.*, 96 Civ. 7159, 1997 WL 774683 (S.D.N.Y. Dec. 12, 1997)). The release in issue in this case was never before that court. Petitioners also ignore the crucial differences between that litigation and this one. Here, the Trustees have maintained from the outset of this case that the "release" purportedly granted by the Company to Petitioners was voidable as a fraudulent conveyance and, in any event, could (and did) not release claims held by creditors, two arguments that were unavailable to the releasing party in the *Nycal Corp. v. Inoco, Plc.* case.

the Trustees had satisfied their *prima facie* burden[8] of establishing that the Petitioners were subject to personal jurisdiction under the Idaho long-arm statute. (A 114a-124a.) The Bankruptcy Court held that personal jurisdiction existed over Rowland and Hudd for the fraudulent transfer, misrepresentation and civil conspiracy counts in the Complaint because, in furtherance of their scheme to loot Gulf, they made misrepresentations in Idaho and performed out-of-state acts causing injury in Idaho. (A 120a.) The Bankruptcy Court also held that James, Moran and Inoco were subject to personal jurisdiction in Idaho for the fraudulent transfer, misrepresentation and civil conspiracy counts of the Complaint because any misrepresentations made by Rowland and Hudd were attributable to them as co-conspirators. (A 122a-124a.) The Bankruptcy Court also concluded that the exercise of personal jurisdiction over Petitioners under the Idaho long-arm statute accorded with due process based on Petitioners' aggregate contacts with the United States. (A 136a-137a.)[9]

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[8] Because no discovery was taken and no evidentiary hearing was held, the Bankruptcy Court correctly concluded that the Trustees were required to make only a *prima facie* showing of the jurisdictional facts. (A 103a.) Thus, despite the Rowland Directors' claims that they have disputed the allegations against them (RD Petition at 13 n.10 & 15 n.11), the Bankruptcy Court properly placed little emphasis on Petitioners' meaningless, conclusory affidavits in which they denied wrongdoing or participation in a conspiracy while assiduously avoiding any discussion of the facts of the case.

[9] The Rowland Directors err when they state that the Bankruptcy Court "relied entirely on a brief letter" signed by Rowland and "relied solely on a conference purportedly attended by Hudd" in finding that sufficient facts had been pleaded to exercise jurisdiction over these Petitioners. RD Petition at 12-13. In fact, the Trustees submitted, and the Bankruptcy Court relied upon, detailed allegations contained in the 86-page, 265-paragraph Complaint as well as exhibits attached to various affidavits. Although *one* of the allegations in *one* of the affidavits submitted by the Trustees was later corrected by the affiant, the District Court found that the affiant had confirmed the accuracy of all other facts set forth in the affidavit and that, therefore, the admitted error was "not grounds for discounting [the] remaining declarations." (A 39a n.6.)

2. The District Court

The United States District Court for the District of Idaho granted Petitioners leave to pursue an interlocutory appeal. (A 66a-68a.) On August 16, 1996, the District Court affirmed the Bankruptcy Court's decision, albeit on somewhat different grounds.[10] (A 34a-57a.) The District Court held that jurisdiction over Petitioners existed under the Idaho long-arm statute as to all counts in the Complaint -- including a corporate waste and mismanagement count previously dismissed by the Bankruptcy Court -- other than breach of contract. (A 56a.) Relying on well-settled Ninth Circuit and Idaho precedent to the effect that the exercise of personal jurisdiction under the Idaho long-arm statute is intended to extend to the full limits of due process, the District Court applied the Ninth Circuit's three-pronged due process test in concluding that personal jurisdiction existed over Petitioners. (A 48a.) Crediting the allegations of the Complaint and the affidavits and other submissions of the Trustees -- all of which were uncontroverted -- the District Court correctly concluded (*i*) that Rowland, Hudd and James intentionally directed their actions or aimed their conduct at Idaho such that the purposeful availment prong of the Ninth Circuit's due process test was satisfied;[11] (*ii*) that the acts of these defendants could be attributed to Moran and Inoco as co-conspirators; (*iii*) that but for Petitioners' contacts with Idaho, the claims asserted in the Complaint (other than the claim for breach of contract) would not have arisen; and (*iv*) that the exercise of personal

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[10] In important *dicta*, the District Court recognized the possibility that jurisdiction might exist over Petitioners pursuant to federal law – in addition to the Idaho long-arm statute – once revised Bankruptcy Rule 7004(f) became effective on December 1, 1996. (A 45a n.9.)

[11] The District Court's application of the well-established "effects" test renders moot Petitioners' protestations that they have "no contact with the State of Idaho" (Inoco Petition at 3) and that none of the commercial transactions described in the Complaint "occurred in Idaho or involved Idaho residents or entities." RD Petition at 9.

jurisdiction over Petitioners in Idaho was, under all the circumstances, reasonable. (A 48a-56a.)

3. The Court of Appeals

Petitioners again sought and obtained leave to appeal. During this time, revised Bankruptcy Rule 7004(f) became effective. Thus, the Trustees advanced before the Court of Appeals no fewer than three separate grounds upon which the decisions of the Bankruptcy Court and the District Court could be affirmed. In addition to providing alternative theories of jurisdiction predicated on the Idaho long-arm statute, the Trustees demonstrated that revised Bankruptcy Rule 7004(f) definitively supported the exercise of personal jurisdiction over Petitioners under federal law. Specifically, the Trustees demonstrated that revised Bankruptcy Rule 7004(f) was expressly amended to permit the exercise of jurisdiction over a foreign defendant "in a civil proceeding arising under the Code or arising in or related to a case under the Code," provided that the exercise of jurisdiction was consistent with due process, based on the defendant's aggregate contacts with the United States as a whole. Because Petitioners had sufficient aggregate contacts with the United States to satisfy due process -- a point the Rowland Directors conceded -- the Trustees argued that the exercise of jurisdiction over them was appropriate under the revised rule.

In an amended opinion issued on January 14, 1998, the Court of Appeals concurred with the Trustees' analysis of the applicability of revised Bankruptcy Rule 7004(f).[12] (A 1a-14a.) As a threshold matter, the Court found the application of the

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[12] Petitioners mischaracterize the Ninth Circuit's decision, claiming that the Ninth Circuit "[n]o doubt recogniz[ed]" that jurisdiction could not be predicated on the Idaho long-arm statute and therefore limited its analysis to revised Bankruptcy Rule 7004(f). RD Petition at 3; Inoco Petition at 3. In actuality, the Ninth Circuit simply concurred with the Trustees' view that Bankruptcy Rule 7004(f) was dispositive on its face, thereby eliminating the need to review the findings below with respect to the Idaho long-arm statute.

revised rule appropriate, stating that "[p]resent law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." (A 10a (quoting *Landgraf v. USA Film Prods.*, 511 U.S. 244, 274 (1994) (internal quotation marks omitted)).) Moreover, the Court of Appeals concluded that the application of revised Bankruptcy Rule 7004(f) to the instant action would be "just and practicable" -- in the words of this Court's Order adopting the revised rule -- because Petitioners' argument that they could not reasonably have expected being haled into court in Idaho was unpersuasive since they had at least to reckon with application of the Idaho long-arm statute to their dealings affecting Idaho creditors. None of the defendants offered facts to show that they would have behaved differently had they expected Rule 7004(f) to apply or that they have been otherwise prejudiced. (A 11a (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957)).)

Applying revised Bankruptcy Rule 7004(f) to the instant case, the Court of Appeals noted that "the Rowland Directors do not contest the constitutional basis for personal jurisdiction" over them but acknowledged that "Inoco contends that it lacked sufficient contacts with the United States." (A 13a.) In holding that jurisdiction could be properly exercised over all Petitioners, however, the Court of Appeals deferred to the findings of fact made by the Bankruptcy Court (and confirmed by the District Court):

> [T]hese alien defendants reached out to Gulf in the United States and forged a continuing relationship with it. The alleged looting of Gulf foreseeably caused Gulf injury in the United States where it was located. . . . [T]he alleged injuries arise out of the defendants' purposeful direction of their activities toward the United States.

(A 13a.)

REASONS FOR DENYING THE PETITIONS

What Petitioners are requesting is for the Court to examine a record already carefully inspected by no fewer than three other federal courts and conclude that the Court of Appeals abused its discretion when it found that it was "just and practicable" -- in the words of this Court's own Order -- to apply Bankruptcy Rule 7004(f) to these facts in upholding the exercise of personal jurisdiction over Petitioners. Because the question presented by Petitioners is concededly one of first impression that has not been decided by any federal court other than the Ninth Circuit, much less created a split among the circuits; because no important question of constitutional interpretation is essential to the outcome of this case and there exist at least two alternative grounds upon which the same substantive result could be reached if this Court were to reverse and remand; and because the Ninth Circuit's decision is fundamentally correct, the petitions for writs of *certiorari* should be denied.[13]

A. The Decision Below Is Not Contrary To Supreme Court Precedent And Does Not Present A Conflict Among The Circuits Requiring This Court's Attention

In its decision affirming the exercise of jurisdiction over Petitioners, the Court of Appeals relied, *inter alia*, on two Supreme Court precedents, *Landgraf* and *McGee*, in finding that the application of revised Bankruptcy Rule 7004(f) to this case comported with due process. (A 10a-11a.) Significantly, in urging the Court to issue writs of *certiorari*, Petitioners fail to allege that either of these precedents was in any way wrongly decided. Rather, Petitioners meekly claim that the Court of Appeals "mechanically appl[ied] dictum" from *Landgraf* in

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[13] "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment" below. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Although the Trustees' dispute Petitioners' claim that the Ninth Circuit's opinion was wrongly decided, the petitions should be denied for a variety of additional reasons.

reaching an incorrect conclusion. RD Petition at 18; Inoco Petition at 15.

Petitioners point, however, to no other federal court decision that analyzes similar issues and reaches a different result. In fact, Petitioners concede that this action is the "first and only" time in which the application of revised Bankruptcy Rule 7004(f) has been discussed by any court. *Id.* Contrary to Petitioners' claim that this action "thus is properly before this Court for review," *id.*, it is well-established that such circumstances militate against the issuance of writs of *certiorari*. *See, e.g., McCray v. New York*, 461 U.S. 961, 962-63 (1983) (denying *certiorari*) ("There is presently no conflict of decision with the federal system. . . . [I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.") (Stevens, J.). For this reason, the petitions should be denied.

B. The Question Presented To This Court By Petitioners Is Not Crucial To The Ultimate Disposition Of This Case, As There Exist Several Separate Non-Constitutional Grounds Upon Which The Same Result Can Be Reached

As noted above, the Trustees offered to the Court of Appeals no fewer than three separate grounds upon which the decisions of the Bankruptcy Court and the District Court could be affirmed. At the Trustees' urging, the Court of Appeals embraced the least complicated of the three theories (without addressing the others) and found Petitioners subject to the jurisdiction of the Bankruptcy Court under federal law (as opposed to under the Idaho long-arm statue).

Petitioners contend that the Court of Appeals abused its discretion in reaching this result. Even if this Court ultimately were to agree with Petitioners, however, and hold that revised Bankruptcy Rule 7004(f) cannot provide the basis for the assertion of personal jurisdiction over them, there remain two distinct state law rationales that would support the exercise of jurisdiction here. As explained in great detail by both the Bankruptcy Court and the District Court, Petitioners are subject

to jurisdiction under the Idaho long-arm statute based on their actions, both in and outside the State of Idaho, which had intended injurious effects in Idaho. (A 48a-56a, 114a-124a, 132a-146a.) In addition, as both the Bankruptcy Court and District Court correctly found, Petitioners are amenable to suit in Idaho under the conspiracy theory of jurisdiction, a well-established doctrine that is consistent with due process. (A 51a-52a, 121a-124a.) Thus, a remand of this action would not dramatically alter the posture of this case, but rather would likely result in affirmance by the Court of Appeals of the decisions below, albeit on different grounds, pursuant to the Idaho long-arm statute.[14]

In the past, this Court has cautioned that "no matter how much [a party] may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court." *Barr v. Matteo*, 355 U.S. 171, 172 (1957) (*per curiam*). Therefore, "Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing." *Id.* These words apply with force to the instant action. The decision below does not "actually compel[ ]" this Court's review of the propriety of applying revised Bankruptcy Rule 7004(f) to this case. Because the question presented by Petitioners is not "immediately pressing," the writs should be denied.

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[14] Regardless of the ground on which jurisdiction is predicated, Petitioners have made it clear that they have no intention of defending this case on the merits. Rather, their strategy all along has been to default, as their counsel informed the Court of Appeal in England last year. *Inoco Plc and Others v. Gulf USA Corp.*, 1995 I No. 781, Court of Appeal (Eng.), Jan. 22, 1997.

C. This Court Is Not In The Practice Of Reviewing Appellate Decisions Where The Alleged Defect Occurred With Respect To A Finding Of Fact

The question presented to this Court by Petitioners is "[w]hether it was just and practicable" for the Court of Appeals to apply revised Bankruptcy Rule 7004(f) to this case. RD Petition at i; Inoco Petition at i. Of course, the fairness and propriety of applying the revised rule to the instant action was the very same issue before the Court of Appeals itself. After a careful review of the record, that court answered this question in the affirmative. Now, Petitioners attempt to persuade this Court to revisit what was, at its core, an exercise of discretion by the Court of Appeals based on a review of the entire record.

It is this Court's longstanding practice "not [to] grant *certiorari* to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.). Moreover, the Court of Appeals based its findings on factual conclusions drawn by the Bankruptcy Court (and confirmed by the District Court) after its initial review of the Complaint and the various affidavits filed in this action. In such circumstances, "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (citing cases); *see also Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980) ("In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous."). For this reason alone, the petitions should be denied.

D. The Court Of Appeals Did Not Abuse Its Discretion In Determining That It Was "Just and Practicable" To Apply Revised Bankruptcy Rule 7004(f) To This Pending Case

In addition to the above reasons, each of which compels the denial of the petitions in the instant action, the judgment below was, indeed, quite correctly entered.

In 1993, when Federal Rule of Civil Procedure 4(k)(2) was added to authorize, in a federal question case, extraterritorial service upon a foreign defendant not subject to personal jurisdiction in any state, a corresponding revision to the Bankruptcy Rules was not made at that time, thus creating a (presumably inadvertent) gap between the two sets of provisions. On December 1, 1996, this gap was closed when revised Bankruptcy Rule 7004(f) became effective.[15]

The Order of this Court adopting the revisions to the Bankruptcy Rules stated in the clearest of terms that the revised rule should be applied "insofar as just and practicable [to] all proceedings in bankruptcy cases then pending." (A 181a.) As noted above, the Ninth Circuit found that it was "just and practicable" to apply the revised rule here, because the Petitioners did not "offer facts to show that they would have behaved differently had they expected Rule 7004(f) to apply or that they have been otherwise prejudiced." (A 11a.) Before this Court, Petitioners argue that the Ninth Circuit's holding

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[15] The legislative history of the revisions to the Bankruptcy Rules makes clear that the new provisions were meant to be remedial in nature and were promulgated merely to conform the Bankruptcy Rules to the updated version of the Federal Rules. As explained in the Committee Note published in connection with the revised Bankruptcy Rules, the "new subdivision (f) . . . clarifies that service . . . in accordance with this rule or the applicable subdivisions of F. R. Civ. P. 4 is sufficient to establish personal jurisdiction over the defendant." 10 Lawrence P. King, *Collier on Bankruptcy* App. 7004 at 7004-39 (15th ed. rev. 1996). In the instant case, Petitioners were all served in England under the Hague Convention.

There is, however, an important distinction between Federal Rule 4(k)(2) and revised Bankruptcy Rule 7004(f). Under the Federal Rule, jurisdiction is only authorized if it comports with Fifth Amendment due process concerns *and* the defendant is not subject to the jurisdiction of the courts of any particular state. In contrast, the Bankruptcy Rule establishes jurisdiction over a foreign defendant in *any* "civil proceeding arising under the Code or arising in or related to a case under the Bankruptcy Code" and *regardless* of whether the defendant is also subject to the jurisdiction of any particular state. The fact that Petitioners may also be subject to jurisdiction under the Idaho long-arm statute is thus, in a word, irrelevant under Bankruptcy Rule 7004(f).

> overlooks the fact that amended Bankruptcy Rule 7004(f) did not exist at the time factual evidence was submitted to the Bankruptcy Court, so Petitioners never had the opportunity to submit any evidence relating to the applicability of the amended Rule or its effects on Petitioners' conduct.

RD Petition at 17; *see also* Inoco Petition at 18. The Court of Appeals, however, considered and rebuffed this argument, recognizing that Petitioners can make no credible claim that the existence of Bankruptcy Rule 7004(f) between 1989 and 1991 (during Petitioners' stewardship of Gulf) -- much less in 1994, when this action was commenced -- would have caused them to behave differently:

> It is difficult to see how Rule 7004(f) might have induced [Petitioners] into behavior that the long-arm statute did not. The argument, in any event, is not persuasive in light of their failure to give any indication in their briefs or petitions [as to] what facts they might have offered for this purpose.

(A 11a n.2.)

Petitioners consistently refer to the application of revised Bankruptcy Rule 7004(f) to this case as "retroactive," as if their invocation of that word should alone automatically decide the matter in their favor. There is, however, nothing "retroactive" about the application of the revised rule to the instant action, and Petitioners' claim that the Ninth Circuit "has effectively created jurisdiction over [them] where none previously existed" is completely misguided. RD Petition at 3; Inoco Petition at 3-4. First, as previously determined by the Ninth Circuit, the presumption against retroactivity in certain circumstances "generally does not apply to rules conferring or withdrawing jurisdiction." *Arrowhead Estates Dev. Co. v. United States Trustee* (*In re Arrowhead Estates Dev. Co.*), 42 F.3d 1306, 1311 (9th Cir. 1994) (citing *Landgraf*). Further, in direct contrast to Petitioners' claim that the "application of the new Rule to this

case would alter [their] rights" (RD Petition at 18; *see also* Inoco Petition 16), this Court has held that "statutes affecting jurisdiction speak to the power of the court rather than to the rights or obligations of the parties." *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring). Therefore, because a court that exercises expanded jurisdiction does *not* burden parties with new consequences to previous actions, the exercise of such power does not implicate "retroactivity" concerns. *See McGee*, 355 U.S. at 224 (holding that an amendment to a long-arm statute "neither enlarged nor impaired respondent's substantive rights or obligations").

In any event, application of Bankruptcy Rule 7004(f) to this case provided an *additional*, rather than the exclusive, basis for upholding jurisdiction over Petitioners. Far from "creating jurisdiction over [them] where none previously existed," the Court of Appeals simply affirmed that, no matter how you analyze the facts -- under the Idaho long-arm statute or under revised Bankruptcy Rule 7004(f) -- Petitioners may be held accountable for their misdeeds, which adversely affected the lives of thousands of Idaho residents, in the Bankruptcy Court.

CONCLUSION

For all of the above-stated reasons, the petitions for writs of *certiorari* should be denied.

Dated: May 12, 1998

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No. 97-1697 (3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

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Debtors.

INOCO PLC,

Petitioner,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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In order to avoid burdening the Court with excess written matter, Petitioner, Inoco Plc, hereby adopts the arguments contained in the Reply to Brief in Opposition submitted on behalf of Petitioners' David J. Rowland, Jeremy E. James, Derek J. Moran and David L. Hudd in connection with their Petition filed under Docket No. 97-1683 as if set forth more fully herein.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Dated: May 22, 1998

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